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CONCLUSIVENESS OF THE "ENROLLED BILL" AS TO CONSTITUTIONAL REQUIREMENTS RELATIVE TO ITS ENACTMENT.—Where a constitutional requirement relative to the enactment of statutes has not been complied with, the question whether the courts may resort to the legislative journals to declare void the bill which has been duly certified by the officers of the legislature, approved by the governor, and deposited with the secretary of state, is one on which the decisions are in great conflict. From the numerous phases of the subject this note will attempt to consider only one branch, namely, can the courts where the constitution of a state requires that a certain act be done in connection with the passage of a bill and further requires that an entry of such act made on the journal, resort to the journal to impeach the act by showing that there is no record of it on the journal. In other words is the duly "enrolled bill" conclusive as to its enactment in compliance with all the constitutional requirements, even as to matters required by the constitution to be evidenced on the journal.

The question arose in the recent case of *Kelly* v. *Marron* (N. M.), 153 Pac. 262. The constitution of New Mexico provided that after a bill had been passed it was to be read in full and signed by the presiding officer of each house and that the fact of such reading and signing should be entered on the journal.[1] Everything re-

[1] Constitution of New Mexico, Art. 4, § 20. "Immediately after the passage of any bill or resolution, it shall be enrolled and engrossed and read publicly in full in each house, and thereupon shall be signed by the presiding officer of each house in open session, and the fact of such reading and signing shall be entered on the journal."

garding the passage of the bill in question was regular except that it did not appear upon the journal that the bill was read in full in each house. The court however held, against the great weight of authority, that the properly authenticated act, on file in the office of the Secretary of State, certified and signed as required by the constitution was absolutely conclusive as to its regular passage in accordance with the provisions of the constitution and that the court could not resort to the journals to impeach the bill. The courts are in an almost irreconcilable conflict on the question and the only way to bring any order out of the decisions of the different jurisdictions is to classify them.

There are a very few jurisdictions where the enrolled bill is held absolutely conclusive as to all matters, and to preclude any investigation as to the method of its enactment.[2] In other words the courts which appear to follow this doctrine hold that the courts can not go behind the duly authenticated bill to the legislative journals for any purpose. They look upon the journal as merely a means by which the public can be informed of the doings of their representatives, and not as a record to be used as evidence of legislative enactments.

The other main division of authorities is made up of cases which do not hold to the doctrine of absolute conclusiveness. These may be divided into two classes as a result of two types of constitutional provisions upon this subject. Certain constitutional provisions are mandatory in requiring the fact and method of enactment of a bill to appear on the journal; others do not require enactments to be so evidenced.

One class of these cases holds that the enrolled bill raises only a prima facie presumption of compliance with the constitutional requirements, but that as to matters not required by the constitution to be entered on the journal, the bill signed, authenticated and recorded, is conclusive of its legal passage, in the absence of an affirmative showing on the journal to the contrary.[3] These cases are based on the theory that in determining whether or not the constitutional requirements with respect to the passage of bills, have been

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[2] Yolo County *v.* Colgan, 123 Cal. 265, 64 Pac. 403, 85 Am. St. Rep. 41; Sherman *v.* Story, 30 Cal. 253; Duncan *v.* Coombs, 131 Ky. 330, 115 S. W. 222; Laferty *v.* Huffman, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203; Osburn *v.* Beck, 25 Nev. 68, 56 Pac. 1008. The Supreme Court of the United States in the case of Field *v.* Clark, 143 U. S. 649 held that it is not competent to show from the journals of either house of congress that an act so authenticated and deposited did not pass in the precise form in which it was signed by the presiding officers of the two houses and approved by the president. De Loach *v.* Newton, 134 Ga. 739, 68 S. E. 708; Whitley *v.* State, 134 Ga. 758, 68 S. E. 716; Atlantic Coast Line R. Co. *v.* State, 135 Ga. 545, 68 S. E. 725.

[3] Hall *v.* Steel, 82 Ala. 562, 2 South. 650; Keene *v.* Jefferson County, 135 Ala. 465, 33 South. 435; Glidewell *v.* Martin, 51 Ark. 559, 11 S. W. 882; Pelt *v.* Payne, 60 Ark. 637, 30 S. W. 426; Andrews *v.* People, 33 Col. 193, 79 Pac. 1031, 108 Am. St. Rep. 76; Mass. Mut. Life Ins. Co. *v.* Colorado L. & T. Co., 20 Col. 1, 36 Pac. 793; In re Ellis, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514.

complied with, resort may be had to the legislative journals and if it affirmatively appear that the provision of the constitution were not observed a bill is invalid, but, if the journal is merely silent on this question, it must be presumed that the constitution was followed.

As was said by Clopton, J. in Hall *v.* Steel[4]: "We have uniformly held that, when the constitution does not require the journal to affirmatively show that a particular thing necessary to the validity of the legislative action was done, mere silence will not invalidate, and in such a case we will presume that the legislatures observed their obligation." Furthermore recitals of the legislative journal and the presumptions which attach to their silence, can not be contradicted by verbal statements.[5]

The other class of cases which does not hold to the doctrine of "absolute conclusiveness" is that involving the question of the failure to make an entry upon the journal of certain acts essential for constitutional enactment of the bill, the entry of such acts being mandatory under the constitution. These cases hold that where the journal is silent as to the compliance with a constitutional requirement, filing of which the constitution says must be evidenced by an entry on the journal, then, the bill may be impeached.[6] An example of this type of case is where the constitution of a state requires the ayes and nays to be entered on the journal, making the bill a nullity if such entry is not made. The reasoning of these cases is best brought out by the words of Goff, C. J. in the case of Stanley County *v.* Coler,[7] "The people of the State of North Carolina, in their constitution have expressly limited the power of their legislature relating to taxation, and point out certain indispensible prerequisites that must not only exist as a fact, but must also appear on the journals of that legislature in a certain way. * * * The entry of the ayes and nays on the last two readings must appear on the journal in order to comply with the requirements of the constitution, and unless they do so appear the bill is not to become a law, and the evidence of its nullity is in the journal provided by the constitution itself."

It will be noticed that this last class of cases are in point with the recent case of Kelly *v.* Marron, *supra,* and are directly contrary

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[4] *Supra.*

[5] Andrews *v.* People, *supra.*

[6] Lambert *v.* Smith, 98 Va. 268, 38 S. E. 938, 6 Va. L. Reg. 45; Stanley County *v.* Coler (C. C. A.), 96 Fed. 284, reversed on rehearing on other grounds in 51 C. C. A. 379, 113 Fed. 705, which later decision is affirmed in 190 U. S. 437; Tyler *v.* State, 159 Ala. 126, 48 South. 672; State *v.* Martin, 160 Ala. 181, 48 South. 846; Rio Grande Sampling Co. *v.* Cathin, 40 Col. 450, 94 Pac. 323; Union Bank *v.* Oxford, 119 N. C. 214, 25 S. E. 966. Merely introducing excerpts from the journal does not make a sufficient showing as to the silence of the journal, to impeach the bill. Denver *v.* Rubidge, 51 Colo. 224, 116 Pac. 1130. And furthermore if the journal is defective, mutilated or incomplete, its silence will not impeach the bill. State ex rel. Douglas County *v.* Frank, 60 Neb. 327, 83 N. W. 74, on rehearing, 61 Neb. 679, 85 N. W. 956.

[7] *Supra.*

to it. And also with the exception of the few cases that adhere to the doctrine of absolute conclusiveness is directly contrary to the weight of authority.[8]

The view taken in the instant case therefore has very little support and loses sight of the fact that the constitution has the power to provide in what manner and mode bills shall become laws and that that solemn instrument is the evidence of the supreme will of the people. Therefore when the constitution does provide certain requisites and the way that such requisites shall be evidenced it surely seems that they should be complied with or the bill does not become a law. This proposition is fundamental and is not lost sight of in those cases which hold that where a certain matter relative to the passage of the bill must be entered on the journal the bill is a nullity unless it is so entered.[9]

The only reasons for adopting the doctrine of absolute conclusiveness as done by the New Mexico court in the instant case are ones of convenience and perhaps public policy, as any other view would necessitate a person making an exhaustive search through the journals in order to determine whether or not a statute which gives him certain rights and is properly certified by the speaker of the House, the president of the Senate, and approved by the Governor, is really a valid act of the legislature and one on which it would be safe to rely. But demands of convenience and so-called public policy are not valid excuses for disregarding the demands of the Constitution of a State.

ADMISSIBILITY OF EVIDENCE AS TO UNCHASTITY OF ALLEGED VICTIM OF RAPE TO SHOW PROBABILITY OF CONSENT.—In the oft quoted words of Lord Hale, "An accusation for rape is one easily made, hard to be proved, and still harder to be defended by one ever so innocent." [1] The defense most frequently made is that the prosecutrix consented to the act. Since the act is almost invariably performed with the greatest possible secrecy, and never in the presence of a third person, the defendant must necessarily rely almost entirely upon circumstantial evidence to establish this defense. Since it is much more probable that a woman already guilty of indulgence in illicit sexual intercourse will consent to the act than a virgin of uncontaminated purity, it is clear that previous unchastity of the prosecutrix is a circumstance of the highest probative value on the question of consent.[2] But how may such lack of chastity be proved?

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[8] See note 2, *supra*.

[9] See note 2, *supra*.

[1] 1 Hale, P. C. 635.

[2] "It would be absurd, and shock our sense of truth, for any man to affirm that there was not a much greater probability in favor of the proposition that a common prostitute had yielded her assent to sexual intercourse than in the case of a virgin of uncontaminated purity. All will readily assent to the proposition that she who followed prostitution as a trade would not be so likely to depart from her degraded habit, and resist an offer for indulgence of illicit vice, as would the woman of perfect purity, whose every instinct would prompt her to revolt at